SUBJECT INDEX

Page

Argument 1

I.

Respondent's argument that the terminable interest rule is applicable to support allowances paid in cash is not well founded 1

II.

Even under an assumption that the terminable interest rule is applicable to support allowances paid in cash, Petitioners submit that the amounts paid to decedent's widow should be held to qualify under the marital deduction provisions 8

Conclusion 10

TABLE OF AUTHORITIES CITED

Cases	Page
Blair, Estate of, v. Ruoff, 42 Cal. 2d 728, 269 P. 2d 612	6
Bookwalter v. M. Phelps, Exrx., 325 F. 2d 186	7
Dougherty v. United States, 292 F. 2d 331	3, 7
Gale, Margaret R., Estate of, 35 T. C. 215, Acq. 1962-2 C.B. 4	7
Landers, William A. Sr., Estate of, 38 T. C. 828	5, 7
Lux, In re, 114 Cal. 73, 45 Pac. 1023	6
Paddock, William, Estate of, 20 T. C. M. 1350	7
Rensenhouse, Proctor D., Estate of, 31 T. C. 818	7
Rudnick, Michael G., Estate of, 36 T. C. 1021, Acq. 1962-2 C.B. 5	7
United States v. First National Bank & T. Co. of Augusta, 297 F. 2d 312	7
Miscellaneous	
House Report 2573, 86th Cong., 1st Sess.	3
Senate Report 2375, 81st Cong., 2d Sess., 1950-2 C.B. 576	2, 7
Statutes	
Internal Revenue Code of 1939, Sec. 812(e)	10
Internal Revenue Code of 1939, Sec. 812(e)(1)	1
Textbooks	
3 Bancroft's Probate Practice, (2d Ed.), Sec. 732	7
1 Condee, California Probate Court Practice, Sec. 464	7
3 United States Code Congressional and Administrative News, 83d Cong., 2d Sess., 1954, pp. 4621, 4759	2

IN THE

Supreme Court of the United States

October Term, 1963
No. 361

L. R. JACKSON *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

ARGUMENT.

I.

Respondent's Argument That the Terminable Interest Rule Is Applicable to Support Allowances Paid in Cash Is Not Well Founded.

The Brief for the United States herein is limited to the argument that the allowance paid to decedent Richards' widow is a terminable interest. For the reasons stated in the Brief for the Petitioners (pp. 20-24) filed in this Court on January 22, 1964, it is believed that the terminable interest portion of the marital deduction provisions should not apply to cash payments of support allowance and that "property" within the meaning of Section 812(e)(1) as applied to cash sup-

port allowances, should be held to be what the surviving spouse receives.

Senate Report No. 2375 of the 81st Congress, 2d Session, set forth on page 16 of the Brief for the Petitioners, includes the following statement: "However, as a result of the amendment made by this section, such amounts heretofore deductible under Section 812(b) will be allowable as a marital deduction subject to the conditions and limitations of Section 812(e)." Petitioners submit that this language was intended to mean that support allowances would be deductible under the marital deduction provisions, provided there is compliance with the *condition* that the support allowance be paid to the decedent's surviving spouse, the *condition* that the allowance be paid from property included in the gross estate, the *condition* that the support allowance be paid in property (such as cash) which will be taxable in the estate of the surviving spouse, and the *limitation* that the support allowance, together with other amounts deductible under the marital deduction provisions, not exceed fifty per cent of the decedent's adjusted gross estate. The intent of Congress that support payments be allowed under the marital deduction provisions is clear from Senate Report No. 2375, mentioned above, and from the Senate Finance Committee's Report on the Internal Revenue Code of 1954,[1] which includes the following:

> "Your committee rejected a special provision added by the House that allowed widows' allowances to qualify for the marital deduction to the extent paid within 1 year of the decedent's death.

[1] U. S. Code Congressional and Administrative News, 83d Cong., 2d Sess., 1954, Vol. 3, p. 4621, at 4759.

Under present law many widows' allowances qualify for the marital deduction without regard to the time of payment. It is believed that the House bill might raise some question as to the treatment under the marital deduction of these widows' allowances to the extent not received within 1 year of the decedent's death." (Emphasis added.)

The Senate Finance Committee's desire not to restrict the deductibility of support allowance payments under the marital deduction provisions was also evidenced in 1959 by its failure to act upon a bill passed by the House (H.R. 2573, 86th Cong., 1st Sess.) which would also have restricted the deductibility of support allowances.

From the opinion of the Court of Appeals in *Dougherty v. United States*, 292 F. 2d 331 (C. A. 6, 1961), it appears that the decedent's widow elected to take against the will and had her dower right converted, pursuant to Kentucky law, to a cash payment. Decedent's executors claimed the cash payment as a deduction under the marital deduction provisions. This claim was disallowed, the additional tax due by reason of the disallowance was paid, and following denial of a claim for refund, the action was instituted. The United States contended that the terminable interest rule applied. At page 337 of its opinion the court said:

"The problem here involved has been heretofore considered by the Court of Appeals in the Eighth and the Fifth Circuits. United States v. Traders National Bank of Kansas City, supra, 8 Cir., 248 F.2d 667; United States v. Crosby, supra, 5 Cir., 257 F.2d 515. In both of these cases the Court held that the money received by the widow was

not a terminable interest. We agree with the ruling in those cases and with the reasoning of the Court in support of such ruling. As stated in the Crosby case, the provisions of the Internal Revenue Code applicable to the facts of this case should be liberally construed and applied to the purpose of their enactment. The purpose of the provision was to extend to married taxpayers in common law states the advantages of residents of community property jurisdictions by permitting a surviving spouse to acquire, free from estate tax exaction, one-half of what is referred to as the adjusted gross estate of the deceased spouse. Generally speaking, the 'terminable interest' concept was devised for the purpose of assuring that if the property bequeathed to the spouse was to be excluded from the gross estate of the decedent, it would be adequately integrated in the spouse's estate so that on her death, it would not escape the death tax a second time. 'The basic principle * * * is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her estate, provided only that the terms of the transfer are such that this property will be taxable in the estate of the surviving spouse.' Estate of Pipe v. Commissioner, 23 T.C. 99, 104. *Under this construction of the Act, we are more concerned with what the widow actually received in the settlement of her husband's estate than with what she was technically entitled to receive but actually did not receive.*" (Emphasis added.)

The terminable interest argument was also made by the Commissioner of Internal Revenue in *Estate of William A. Landers, Sr.*, 38 T. C. 828 (1962). In response to this the Tax Court, at page 837 of its opinion, says:

> ". . . Under such a restrictive interpretation of section 2056(b), there is hardly any State in which the widow's support allowance would qualify. Cf. *In re Dillman's Estate*, 8 Ill.App.2d 239, 131 N.E. 2d 634 (1956). It is clear to us that Congress could not have intended so narrow a reading of that section. See *Estate of Proctor D. Rensenhouse*, 31 T.C. 818 (1959) (including Judge Pierce's concurring and dissenting opinion, especially at page 829).
>
> "Prior to 1950, amounts expended for widow's support allowances (generally during the entire period of administration) were deductible as administration expenses under section 812(b)(5) of the 1939 Code, subject to the provisions therein (reasonable in amount). By section 502 of the Revenue Act of 1950, Congress repealed section 812(b)-(5) with the following explanations (S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 483, 525, 576):
>
> (Quotation from S. Rept. No. 2375 omitted)
>
> "This history convinces us that Congress still intended, in general, that the support allowances would be deductible. However, because the allowances in some States were thought to be excessive, it desired to bring the allowance within the limits of the marital deduction provisions (espe-

cially the aggregate 50-percent limitation, see section 2056(c)). See *Estate of Edward A. Cunha*, 30 T.C. 812 (1958); affd. 279 F.2d 292 (C.A. 9, 1960); *Estate of Proctor D. Rensenhouse, supra*; *Quivey v. United States*, 176 F. Supp. 433 (D. Nebr. 1959), revd. 292 F.2d 252 (C.A. 8, 1961).

"We have already held in the case of an estate administered in a jurisdiction with laws much like that of Georgia, that the widow's allowance qualified. *Estate of Margaret R. Gale*, 35 T.C. 215 (1960) (Maine law). In *Gale* we recognized (p. 220) that under the decisional law of Maine the widow's rights were defeated if she did not survive until the final decree is made. But, inasmuch as the widow's right was indefeasibly vested *once it was acquired* we allowed the deduction. The only conceivable distinction between our case and *Gale* is that here the controlling State law is statutory and in Maine it was court-made. Manifestly, this is a distinction without a difference. We feel that the *Gale* case is fully controlling here. See also *Estate of Michael G. Rudnick*, 36 T.C. 1021 (Mass. law)." (Footnote omitted.)

On June 30, 1952, the date on which the order was entered in the Richards Estate, Mrs. Richards was entitled to $42,000.00. This amount was vested in her. Neither death nor remarriage would have affected her right or the right of her estate to collect this amount. (*Estate of Blair v. Ruoff*, 42 Cal. 2d 728, 269 P. 2d 612 (1954); *In re Lux*, 114 Cal. 73, 45 Pac. 1023

(1896); 1 Condee *California Probate Court Practice*, Sec. 464; 3 Bancroft's *Probate Practice*, 2d Edition, Sec. 732.) This right would not terminate, fail or pass to another in any event. It should have been held to qualify under the marital deduction provisions. There was no interest in this property (the $42,000.00 cash) which had, could or did pass to another person. It was not a terminable interest. (*United States v. First National Bank & T. Co. of Augusta*, 297 F. 2d 312 (C.A. 5, 1961); *Bookwalter v. M. Phelps, Exrx.*, 325 F. 2d 186 (C.A. 8, 1963); *Estate of William A. Landers, Sr.*, 38 T. C. 828 (1962); *Estate of Michael G. Rudnick*, 36 T. C. 1021 (1961) (Acq. 1962-2 C.B. 5); *Estate of Margaret R. Gale*, 35 T. C. 215 (1960) (Acq. 1962-2 C.B. 4); *Estate of Wm. Paddock*, 20 T. C. M. 1350 (1951).)

With reference to the ten future monthly payments of $3,000.00 each to which Mrs. Richards was entitled under the June 30, 1952, order and which she did in fact receive, Petitioners urge that the "terminable interest rule" is not applicable to cash support payments to a surviving spouse. (*Dougherty v. United States, supra; Estate of Proctor D. Rensenhouse*, 31 T. C. 818 (1959), (opinion of Judge Pierce concurring in part and dissenting in part); S. Rept. No. 2375, 81st Cong., 2d Sess., 1950-2 C.B. 576.)

II.

Even Under an Assumption That the Terminable Interest Rule Is Applicable to Support Allowances Paid in Cash, Petitioners Submit That the Amounts Paid to Decedent's Widow Should Be Held to Qualify Under the Marital Deduction Provisions.

Even though it be assumed, for the purpose of discussion, that the terminable interest rule is applicable to cash support allowances, it is believed that a proper application of the rule is not prejudicial to the position taken by Petitioners. At page 15 of the Brief for the United States it is said:

> "... a marital deduction is allowed for the value of property received under state law where the widow elects to take against the decedent's will. See *United States v. First National Bank & T. Co. of Augusta, supra,* p. 317. Where, under state law, a widow obtains a fixed right to claim a nonterminable interest at her husband's death, the mere procedural requirement that the widow signify her election or file her claim—which she might do immediately—does not make the interest meaningfully contingent. Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property actually passing and vesting. *Dougherty v. United States,* 292 F. 2d 331 (C.A. 6); *United States v. Crosby,* 257 F.2d 515 (C.A. 5); *United States v. Traders National Bank of Kansas City,* 248 F.2d 667 (C. A. 8)." (Footnotes omitted.)

Why should the rule be less generous for a widow claiming a support allowance from her deceased husband's estate than for a widow electing to take against her husband's will? The *right* to the support allowance is obtained at the time of the husband's death, as is the *right* to take against the will, or a *right* to contest the will and have it set aside. Either as a matter of law or otherwise, these rights of the widow may be lost by inaction or by death, but the *right* exists at the time of death, and as stated by Respondent's brief (page 15): "Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property *actually passing and vesting*. (Emphasis added.) The *value* of any right, as opposed to its existence, cannot be ascertained at the time of the decedent's death, and in any estate events occur subsequent to the time of death which affect rights therein and the value of many interests, including those qualifying for the marital deduction. In some estates all rights to beneficial interests are totally destroyed by claims of creditors and other events occurring subsequent to the time of death. The value of a surviving spouse's right to a support allowance will be determined by the property *actually passing and vesting*.

On the date of decedent's death, May 27, 1951, decedent's widow had a *right* to a support allowance. When the court order was entered on June 30, 1952, the value of this right was determined, in part, and Mrs. Richards or her estate was then entitled to the sum of $42,000 cash. Neither death nor remarriage could have affected her right or that of her estate to collect this sum. The right to the $42,000 cash

would not terminate, fail, or pass to another in any event.

With regard to the ten future monthly payments of $3,000 each to which Mrs. Richards was entitled under the court's order, and which she did in fact receive, each passing month gave fruition to a *right* which she had at the time of decedent's death and which gave her an additional $3,000 claim against the estate which neither death nor remarriage could have affected, a claim against the estate which vested absolutely and in which no other person had any interest. "Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property *actually passing and vesting.*" (Emphasis added.) (Resp. Br. p. 15.)

Conclusion.

For the reasons stated in the Brief for the Petitioners and in this Reply Brief, it is respectfully submitted that a deduction should have been allowed under the provisions of 1939 I. R. C. Section 812(e) for the $72,000.00 of support allowance paid to decedent's widow, and that the judgment of the court below should be reversed.

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